SUPREME COURT, U. S.

DEC 26 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-537

J. L. PIERCE,

Petitioner

versus

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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SUBJECT INDEX

	Page
TABLE OF CASES	ii
TABLE OF CONSTITUTIONAL PROVISIONS	iv
TABLE OF STATUTES	iv
OPINIONS OF COURTS BELOW	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	7
CONCLUSION	14
CERTIFICATE OF SERVICE	16

TABLE OF CASES

Page

Beard v. Alexander, 341 U.S. 622, 95 L. Ed. 1233, 35 A. L. R. 2d 335 11

Ginzburg v. United States, 383 U. S. 463, 16. L. Ed 2d 31, 86 S. Ct. 942 (1966) 13

Hamling v. United States, ——U. S.——, 41 L. Ed. 2d 590, 94 S. Ct.—— (1974) 8, 9, 13, 14

Kaplan v. Californio, 413 U. S. 115, 37 L. Ed. 2d 492, 93 S. Ct. 2680 (1973) 13

Kois v. Wisconsin, 408 U. S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966) 11

McKinney v. State, 287 Ala. 648, 254 So. 2d 714 (1971) 5, 6, 9, 13

Memoirs v. Massachusetts, 383 U. S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966) 5, 7, 8, 9, 10

Miller v. California, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) 2, 5, 5, 6, 7, 8, 9, 10, 14

Mishgin v. New York, 383 U. S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966) 11

Paris Adult Theater I v. Slaton, 413 U. S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973) 13

Pierce v. State, ——Ala.——, 296 So. 2d 218 (1974) 1, 5

Page

Roth v. United States, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) 5, 7, 9, 10, 11

Smith v. California, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959) 10

Stanley v. Georgia, 394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 10

Thornhill v. Alabama, 310 U. S. 88, 84 L. Ed. 1093 11

TABLE OF CONSTITUTIONAL PROVISIONS

Page

First Amendment to the Constitution of the United States 3

Fifth Amendment to the Constitution of the United States 3

Fourteenth Amendment to the Constitution of the United States 3

TABLE OF STATUTES

Page

Title 14, Section 374(3)-374(4), Code of Alabama 1940, as amended (Recompiled 1958) (Supp. 1971) 2, 3, 5, 6, 7, 8, 9, 10, 13, 14

18 U. S. C., § 1461 [18 U.S.C.S., §1461] 8, 9

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I

OPINIONS OF THE COURTS BELOW

The memorandum of the Court of Criminal Appeals of Alabama, affirming the Petitioner's conviction without opinion, is not reported.

The opinion of the Supreme Court of Alabama affirming the Petitioner's conviction is reported as follows: *Pierce v. State*, ——Ala. ——, 296 So. 2d 218 (1974).

II

QUESTIONS PRESENTED

A.

Is an individual denied due process of law when he is prosecuted and convicted under a state statute outlawing obscenity where he is convicted under a construction of the statute defining "obscenity" in accordance with the pre-*Miller* standards and where state appellate courts reviewed said conviction in light of the *Miller* standards?

B.

Where a person engages in the regular business of selling publications which violate or approach violating the criminal statutes relating to obscenity and for that reason the party charges his customers higher prices than are charged by other business for publications of similar size and quality which do not approach a violation of the law, may such a party challenge a criminal conviction growing out his business on the grounds that he did not realize the publication in point was obscene?

C.

Is expert testimony necessary to enable a jury to judge the obscenity of material when that material has been placed into evidence?

D.

Does the action of the Alabama Supreme Court, by engrafting to Title 14, Section 374, by judicial construction,

the tests set forth in *Miller* and applying it on appeal to Petitioner's conviction, which conviction was pre-*Miller* and under a construction of the statute defining obscenity n accordance with *Memoirs,* violate post facto principles?

III

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Act No. 856, of the Regular, 1961 Session of the Legislature of Alabama. Vol. II, Pages 1310-1316 (unofficially codified as Title 14, Section 374(1)-374(16), Code of Alabama 1940, as amended (Recompiled 1959) (Supp. 1971).

IV.

STATEMENT OF THE CASE

The Alabama Supreme Court stated the case and facts as follows:

> "This case is before this court on a Writ of Certiorari to the Court of Criminal Appeals. Petitioner Pierce was charged with violating Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958) (Supp. 1971), in three separate indictments totaling 11 counts, all alleging that Pierce did 'sell, exhibit, or commercially distribute non-mailable and obscene printed or written matter.' The three cases were consolidated, and after a trial to a jury, Pierce was found guilty on all counts. Pierce appealed to the Court of Criminal Appeals which affirmed his conviction and denied rehearing, both without opinion. This court issued a Writ of

Certiorari to the Court of Criminal Appeals to determine whether the statute under which Pierce was prosecuted meets the constitutional requirements of the First, Fifth and Fourteenth Amendments as enunciated in 1973 cases decided by the Supreme Court of the United States, and, to determine the precise effect of these recent developments on cases not finally decided at the time the decisions were handed down.

"On three separate occasions, members of the Montgomery Police Department entered Jimmy's News Stand in Montgomery, Alabama, and purchased several items from petitioner Pierce at random. Officer Brown purchased 'The Pussy Kissers,' 'My First Trick,' 'The Beautiful Yogi and the Stud,' and 'Italia'; Detective Wright purchased the 'Filthy Funny Book' on one occasion and 'The Young Suckers,' 'The Hardup Head Mistress,' 'Little Nudist Quarterly' and a newspaper-type publication identified as 'Cruelty and Sex' on another occasion. All material purchased by both officers was in an area separated from the rest of the bookstore by a wire cage upon which a notice was posted stated, 'Persons under 21 not admitted.'

"The defendant attempted to put into evidence a number of exhibits tending to show what community standards were extant in Montgomery, Alabama, but an objection to the introduction of the exhibits was sustained. Defendant did call a witness who was allowed to testify as to community standards. The trial court charged that in determining whether the matter in evidence was obscene the jury was to consider the community standards of Montgomery, Alabama."

The Supreme Court of Alabama affirmed the Petitioner's

conviction on May 9, 1974. *Pierce v. State,* ——Ala. ——, 296 S. 2d 218 (1974). The major holdings of the Supreme Court of Alabama were as follows:

1. The tests set forth in *Miller v. California,* 413 U. S. 15 (1973) are engrafted by judicial construction to the 1961 Alabama obscenity statute.

2. With the Miller engraftments the 1961 Alabama obscenity statute is constitutional as applied in the context of the instant case.

3. Contemporary community standards referred to in *Miller* are statewide standards in Alabama.

In reaching its decision, the Alabama Supreme Court stated in its opinion inter alia:

> "The first issue this court must deal with is whether the statute contains the necessary specificity as required by *Miller*. The U.S. Supreme Court in *Miller* invites judicial construction as a method of supplying the required specificity if such is absent from the statute. As already mentioned, this court in McKinney I limited the reach of the statute by construing it as encompassing the then current *Roth-Memoirs* tests. The construction in *McKinney* I supplied all the elements of *Roth-Memoirs* tests even though these elements were missing from the statute as drafted. Similarly, this court now specifically incorporates the *Miller* guidelines or test heretofore set out into its construction of the word 'obscene' in Section 374(3). Thus the operation of the provisions of Section 374(4) applicable in this case is limited to matter which depicts or describes sexual conduct. The regulated matter is more specifically restricted to (a) 'Patently offen-

sive representation or description of ultimate sexual acts, normal or perverted, actual or simulated,' or (b) 'Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' Further, the state need only prove the work, taken as a whole, lacks serious literary, artistic, political or scientific value, rather than 'utterly' without such value as was formerly the test.

"The argument is made that *Miller* should not be retrospectively applied and that to construe the statute and apply it to the defendant in the instant case would violate ex post facto principles. This argument is without merit since the U. S. Supreme Court in a footnote to *Miller* states that 'existing statutes as construed *heretofore* or hereafter may be adequate.' (Emphasis added) *McKinney I* was decided prior to the defendant's arrest, indictment and conviction. *McKinney I* limits the operation of Section 374(4) to at least lewd discriptions or pictures of female genitals. This Court, in holding the matter before it to be obscene in an independent review in *McKinney I*, describes the matter as follows:

" 'The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spreadeagled apart, exposing her genital organs.'

* * *

" 'The appellant refers again and again in his briefs to the magazines or "girlie" magazines. A more apt description would be "genital" magazines.'

"Thus there is no doubt that from November 18, 1971, the date *McKinney I* was issued, all persons were

on notice that magazines which contained lewd photographs or descriptions of female genitals were subject to Section 374(4).

"In the case at hand, at least one exhibit covered in each indictment contains lewd photographs or descriptions of female genitals. There can be no doubt that as to such photographs or descriptions the *Miller* requirement for specificity had been supplied by *McKinney I* and that as applied to said matter, the potential vagueness of the statute had been cured by prior judicial construction.

"The other post facto problem arises because *Miller* establishes a new social value norm. If the defendant would have been protected by the test of *Roth-Memoirs* but not by the *Miller* standards then arguments pertaining to ex post facto considerations could arise. The defendant here was found guilty under the old, but more stringent, 'utterly' test, however, and an independent determination that the matter was utterly without redeeming social value was correct If a defendant is protected by the restrictiveness of the 'utterly' test then it is inescapable that he is within the protection shield of the 'serious' test for any publication which is utterly without value could have no serious value. Thus in this case there is no ex post facto problem applicable to the newly-created three-pronged test of *Miller*.

V.

ARGUMENT

Each of the questions raised by the Petitioner in this case have been answered by this Court unfavorably to Pe-

titioner in *Hamling v. United States*, ——U.S.——, 41 L. Ed. 2d 590, 94 S. Ct.——(1974). Both *Hamling*, supra, and the instant case involved convictions which were had prior to this court's decision in *Miller v. California*, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), but which had not become final at that time. Both convictions were had under statutes which had been construed as defining "obscenity" in accordance with *Memoirs v. Massachusetts*, 383 U. S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

A

Petitioner first asserts that Title 14, Section 374(4), Code of Alabama, was unconstitutionally vague as applied to him, arguing that the statute did not contain a description of the specific sexual conduct referred to in *Miller*, and that prior to *Miller*, the statute had not been construed to apply to that specific sexual conduct. That this court did not intend by *Miller* to hold unconstitutional all prior state statutes is expressed in *Hamling v. United States*, ——U. S. ——, 41 L. Ed. 2d 59, 94 S. St. ——, by Mr. Justice Rehnquist:

> "At no point does *Miller* or any of the other obscenity decisions decided last term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 USC § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller*, 413 US, at 24, n 6, 37 L. Ed. 2d 419, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes as construed heretofore or hereafter may well be adequate."

Prior to this Court's decision in *Miller*, Title 14, Section

374, had been authoritatively construed in a manner consistent with *Miller*. In a 1971 decision, the Alabama Supreme Court held that the Title 14, Section 374(3) definition of obscenity, upon which Section 374(4) is dependant, embodied the *Roth-Memoirs* tests. *McKinney v. State*, 287 Ala. 648, 254 So. 2d 714 (1971). This was prior to Petitioner's 1972 arrest and conviction. *McKinney*, supra, thus cured any potential vagueness in Section 374(4). Similarly, on review by Petitioner's case the Alabama Supreme Court specifically incorporated the *Miller* tests into the construction of the word "obscene" in Section 374(3), a procedure which this Court mentions in *Miller*, 413 U. S. at 24, n 6, 37 L. Ed. 2d 419, and a procedure which this Court followed in *Hamling*, supra. Likewise, as was this Court's holding in *Hamling* with respect to 18 USC, § 1461 [18 USCS, § 1461], the Alabama Supreme Court held that with the judicially engrafted *Miller* standards, Sections 374(3) and 374(4), as applied to the Petitioner's case, were constitutional.

The Petitioner's argument, that Section 374(4) was unconstitutionally vague at the time of his conviction because it included the "utterly without redeeming social value" test rejected in *Miller*, was settled against Petitioner in *Hamling* as follows:

> "Petitioners' final *Miller*-based contention is that our rejection of the third part of the *Memoirs* test and our revision of that test in *Miller* indicates that 18 USC § 1461 [18 USCS § 1461] was at the time of their conviction unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of 'social value.' But our opinion in *Miller* plainly indicates that we rejected the *Memoirs* 'social value' formulation, not because it was so vague as to

deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to 'prove a negative.' it imposed a '[prosecutorial] burden virtually impossible to discharge' and which was not constitutionally required. *Miller v. California*, 413 US, at 22, 37 L. Ed. 2d 419. Since *Miller* permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs*, and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners derive no benefit from the revision of that test in *Miller*."

B.

Contra to Petitioner's argument, Title 14, Section 374, Code of Alabama, has never been, nor was it in his case, construed to allow a conviction without proof of scienter or guilty knowledge. *Smith v. California*, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959), cited by Petitioner in support of his argument, is clearly distinguishable in that the Los Angeles ordinance invalidated in that case had been construed by state courts as making a bookstore proprietor absolutely liable criminally for mere possession even though he had no knowledge of the books' contents.

The distinction between the standards applied to those who act gratuitously and those who are motivated by profit was recognized by this Court in *Stanley v. Georgia*, 394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). This Court again recognized the distinction in *Miller* stating:

"The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust

> exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a misuse of the great guarantees of free speech and free press . . . . *Breard v. Alexandria*, 341 US, at 645, 95 L. Ed. 1233, 35 ALR 2d 335. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people, *Roth v. United States*, supra, at 484, 1 L. Ed. 2d 1498 (emphasis added). See *Kois v. Wisconsin*, 408 US, at 230-232, 33 L. Ed. 2d 312; *Thornhill v. Alabama*, 310 US, at 101-102, 83 L. Ed. 1093. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain is a different matter. [footnote omitted] 413 U. S. 15, 34-35, 37 L. Ed. 2d 419, 437.

In *Mishkin v. New York*, 383 U. S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), Petitioner, as here, argued that there was insufficient proof of scienter. This Court rejected that claim with Mr. Justice Brennan stating in part:

> "Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, . . . ; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and pos-

sessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that that appellant was 'aware of the character of the material' and his activity was 'not innocent but calculated purveyance of filth'."

Based on the above excerpt from Mr. Justice Brennan's opinion it seems difficult to contend that scienter was not sufficiently proven on the part of the State in the trial court. All the publications purchased from the Petitioner in this case were in an area separated from the rest of the bookstore by a wire cage upon which a notice was posted stating "Persons under 21 not allowed." There can be no doubt that the average person would easily detect the transparency of the character of materials entitled "The Pussy Kissers," "My First Trick," "The Beautiful Yogi and the Stud," "Young Suckers," "Cruelty and Sex," "Little Nudist," "The Hard Up Headmistress," and "Filthy Funny Book." The repetitive quality of the sequences and formats of the books was established by the Petitioner's own expert witness. There is the presence of an additional element which advances the contention that scietner was proven, and that is the exhorbitant prices paid for materials.

The establishment by the Petitioner as to the situs and manner of merchandising of the materials in the Appellant's store surely indicates that the Petitioner was "aware of the character of the material" and that his activity was "not innocent but calculated purveyance of filth."

It appears logical to the Respondent that if the character of the material was unknown to the Petitioner then he would have displayed it with the other publications in his store

(i.e., "Ladies Home Journal" and "House and Garden"), and would not have felt the necessity of separating the material by means of a "caged off" area.

C

The Petitioner's argument that the government presented no evidence that the particular publications were obscene is without merit. The jury had before them the publications which were introduced into evidence. Expert testimony is not necessary to enable a jury to judge the obscenity of material which has been placed into evidence. See *Hamling v. United States*, ——U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. ——; *Paris Adult Theatre I v. Slaton*, 413 US 49, 56, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); *Kaplan v. California*, 413 US 115, 120-121, 37 L. Ed. 2d 492, 93 S. Ct. 2680 (1973); *Ginzburg v. United States*, 383 US 463, 465, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966).

D

Petitioner argues that *Miller* should not be retroactively applied because to do so would violate ex post facto principles and amounts to an unforeseeable retroactive judicial construction.

In *McKinney v. State*, 287 Ala. 648, 254 So. 2d 714 (1971), cert. denied 405 U.S. 1075 (1972), decided prior to Petitioner's arrest and conviction, the Alabama Supreme Court limited the operation of Section 374(4) to at least lewd descriptions or pictures of female genitals. The material held obscene in *McKinney* was described by the court as follows:

"The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spreadeagled apart, exposing her genital organs."

* * * *

"The appellant refers again and again in his briefs to the magazines or 'girlie' magazines. A more apt description would be 'genital' magazines."

Thus, there can be no doubt that from the date *McKinney* was issued, Petitioner was on notice that publications containing lewd photographs or descriptions of female genitals were subject to Section 374(4).

In reviewing the exhibits which were placed in evidence at this Petitioner's trial, the Alabama Supreme Court found that at least one exhibit covered in each indictment contained lewd photographs or descriptions of female genitals.

The Petitioner was convicted under the more liberal pre-*Miller* standards. If these publications were prohibited under the pre-*Miller* standards, they would certainly be prohibited under *Miller*.

The final difficulty with Petitioner's ex post facto argument is that it has been decided against him in *Hamling v. Unted States*, ——U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. —— (1974).

CONCLUSION

In conclusion, the Respondent, the State of Alabama, respectfully submits that for all the foregoing reasons the writ of certiorari ought to be denied and prays such denial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, do certify that on this the 24th day of December, 1974, I did serve the requisite number of copies of the foregoing Brief of Respondent on each of the attorneys for the Petitioner, by mailing the same to them, air mail postage prepaid, addressed to them as follows:

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